Supreme Court, U.S.
FILED

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No. 06-

IN THE

Supreme Court of the United States

VICTOR VEROLA,

Petitioner,

v.

BRUCE H. COLTON, in his capacity as State Attorney for the Nineteenth Judicial Circuit of Florida,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit affirmed the district court's order finding that an order of the bankruptcy court determining restitution dischargeable was an error pursuant to 11 U.S.C. § 523(a)(7). The Eleventh Circuit and district court made this determination notwithstanding the fact that the restitution was ordered by the state court to pay for pecuniary loss and would not be paid "to and for the benefit of a governmental unit" as required by that statute. Although the facts of this case are not in dispute, questions relating to issues of federalism, the interpretation of the plain language of the bankruptcy code and of two conflicting opinions of this court have been implicated below. The Eleventh Circuit's opinion places itself in conflict with the plain language of the statute, engages in unauthorized judicial legislation, and conflicts with not only the portions of the opinion of this court in *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990) that remain valid, but also with holdings of the Third and Seventh Circuits.[1]

Four questions are presented:

1. Does the *Davenport* opinion overturn *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986) to the extent that (a) restitution orders are "debts" or "claims" as defined by the bankruptcy code that must be

1. It should be noted that there exists a conflict within the Third Circuit itself, which has ruled both that restitution orders are (*In re: Rashid*,210 F.3d 201, 207 (3d Cir. 2000)) and are not (*In re: Thompson*,418 F.3d 362, 368 (3d Cir. 2005)) dischargeable. The attempt by the *Thompson* court to reconcile this conflict also violates both the plain meaning of the statute and this court's opinion in *Davenport*.

scrutinized to the full extent of the provisions of 11 U.S.C. § 523(a) *et seq.*, and (b) when considering issues of dischargeability, a bankruptcy court's concern about federalism "cannot justify rewriting the Code to avoid federal intrusion"? *Davenport* at 564.

2. Can a restitution order be determined non-dischargeable where the bankruptcy code unambiguously provides that a debt is not discharged if the debtor is (1) an individual; (2) the debt is for a fine, penalty, or forfeiture; (3) the debt is payable to and for the benefit of a governmental unit; and (4) the debt is not compensation for actual pecuniary loss, when any one or more of the four statutorily mandated tests is not met?

3. Is the criminal or civil nature of a restitution order, where criminality is not one of the four unambiguous statutory tests, a relevant inquiry in making a determination of non-dischargeability?

4. Is the intent of Congress properly interpreted as preventing the discharge of any restitution where Congress, based on a ruling of the Supreme Court, specifically amended the Bankruptcy Code to deny the dischargeability of restitution orders in Chapter 13 cases and, although it could have, declined to do so in Chapter 7 cases?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, dated April 20, 2006, is reported at 446 F.3d 1206 (11th Cir. 2006). The Eleventh Circuit affirmed the decision of the United States District Court for the Southern District of Florida dated August 16, 2004 which reversed the order of the bankruptcy court dated July 9, 2003. *See* Appendices A – C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Eleventh Circuit's opinion was rendered on April 20, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 11 United States Code, Section 523.

Exceptions to Discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

. . .

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss. . . .

STATEMENT OF THE CASE

1. On March 23, 2001, VEROLA was charged, by state court information, with Fraudulent Transactions and subsequently pled nolo contendere to that charge. On November 21, 2001, the Nineteenth Judicial Circuit in and for Saint Lucie County, Florida adjudicated VEROLA guilty of Fraudulent Transactions pursuant to Fla. Stat. § 517.301(1)(a), holding that between November 15, 1994 and January 23, 1998, the Debtor committed the crime of Fraudulent Transactions when he obtained over $50,000.00 from 81 investors by making an untrue statement of material fact or failing to state a material fact in connection with rendering investment advice or conducting the offer, sale, or purchase of an investment or security. On December 6, 2001, the Debtor was ordered to pay $2,538,557.05 in restitution to the victims through the Florida Department of Corrections system. Restitution was ordered for each victim in the amount each victim was defrauded. The restitution order required VEROLA to fulfill his obligations in the following manner: "Total monetary restitution is to be paid through the Department of Corrections . . . forwarding said restitution to the victim(s), in the manner specified in the order of probation." Nothing in the restitution order found or held the restitution to be anything other than a monetary payment.

2. On March 28, 2000, the Debtor filed a bankruptcy petition in the United States Bankruptcy Court for the Southern District of Florida, listing each of his creditors including the 81 investors he was ultimately held guilty of defrauding. None of the 81 investors objected to the Debtor's discharge or to the dischargeability of the claims they had against VEROLA, and he was granted a discharge on December 6, 2000. On October 17, 2002, an adversary

proceeding was commenced with the filing of the Debtor's Complaint to Determine Dischargeability of Debt pursuant to 11 U.S.C. § 523(a)(7) filed against BRUCE COLTON in his capacity as the State Attorney for the Nineteenth Judicial Circuit of Florida. On January 15, 2003, the Debtor filed his Motion for Summary Judgment. COLTON filed his Motion for Summary Judgment on April 3, 2003. Both parties agreed that there were no genuine issues of material fact. On July 9, 2003, the bankruptcy court, Steven H. Friedman, J., entered an order granting the Debtor's Motion for Summary Judgment and denying the Creditor's companion Motion.

3. An appeal to the United States District Court for the Southern District of Florida followed and, without taking oral argument, the District Court, Donald M. Middlebrooks, J., reversed the order of the bankruptcy court on August 16, 2004.

4. An appeal to the Eleventh Circuit followed, which court rendered its decision affirming the District Court on April 20, 2006.

REASONS FOR GRANTING THE PETITION

This case implicates important questions of state sovereignty versus federalism, bankruptcy law, congressional intent and judicial legislation. Furthermore, this court's guidance is urgently warranted with respect to an apparent conflict between two opinions rendered by this court that deal with several of these issues, *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986) and *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990). The *Kelly* case stands for the proposition that restitution orders are not in

the nature of "debts" or "claims" as defined by the bankruptcy court and as such are not dischargeable. The case further stands for the proposition that bankruptcy courts should not invoke their jurisdiction as it pertains to a state court's right to punish its convicted criminals as it sees fit, and prohibited federal intrusion in this regard. In direct conflict with these rulings is the *Davenport* case, which although partially overruled by Congress with respect to its effect on Chapter 13 bankruptcy cases, nevertheless remains good law as to the point that restitution orders are, in fact, "debts" and claims" as defined by the bankruptcy code, and therefore subject to a complete analysis pursuant to 11 U.S.C. § 523(a)(7). Furthermore, in the *Davenport* opinion, Justice Marshall[2] clearly stated that a court "cannot justify rewriting the Code to avoid federal intrusion." *Davenport* at 564. While Justice Marshall stated that *Davenport* was not intended to recede from *Kelly*, this statement creates confusion in the fact that this is exactly what *Davenport* did, statements to the contrary notwithstanding.

The issue of whether restitution is dischargeable has been considered by Circuit Courts of Appeal at least four times since 1998. The Third Circuit has visited the issue twice to different results.[3] The Eleventh Circuit had the benefit of prior decisions by the Third and Seventh Circuits that had

2. It is interesting to note that Justice Marshall drafted the *Davenport* opinion using precisely the same rationale he used in his dissent in *Kelly*.

3. In response to the *Davenport* opinion, Congress amended 11 U.S.C. § 523(a)(13) to except from any type of discharge federal restitution and 11 U.S.C. § 1328(a)(3) to except restitution or criminal fines from discharge in a Chapter 13 case. Accordingly, those are not at issue.

correctly analyzed the issue of restitution dischargeability under the "Payable Test" provided by 11 U.S.C. § 523(a)(7), but engaged in judicial legislation by analyzing the applicability of the test in the context of whether a restitution order was civil or criminal in nature – a concept not provided for in the statutes or contemplated by Congress.[4]

The split among the Circuits that have ruled on whether restitution orders are "debts" or "claims" to be analyzed under the Payables Test requires resolution, as does the question of whether the judicial branch's inclusion of a "civil" versus "criminal" restitution test that has never been a part of Bankruptcy Code was proper, or whether it was unauthorized judicial legislation. More important perhaps is the question of federalism as it applies to the Bankruptcy Code: if *Davenport* (which remains undisturbed as to this issue) is the rule of law, then any state court system that imposes restitution to specifically repay victims for the pecuniary amount they lost runs afoul of federal law and may be subject to discharge. This court must clarify the *Kelly* and *Davenport* conflicts, resolve the split between the Circuit Courts of Appeal and provide the states a clear roadmap for how restitution may be properly included in their respective criminal justice systems.

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4. Shortly prior to oral argument at the Eleventh Circuit, the Third Circuit revisited the issue of civil versus criminal restitution and drew a conclusion divergent to that of its prior opinion, but similar to that of Eleventh Circuit herein.

I. Review Is Warranted To Resolve A Conflict Concerning The Interpretation Of Two Opinions Of This Court, *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986) And *Pennsylvania Department Of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990), That Involve Important Questions Of Federalism And Implicate The Proper Interpretation Of Congressional Intent Versus Unconstitutional Judicial Legislation.

> *"If you call a tail a leg, how many legs does a dog have? The answer is four, because calling a tail a leg does no make it so."*
>
> — Abraham Lincoln

The various attempts by at least three of the Circuit Courts and Congress' efforts to overturn at least one of two rulings by this Court have created a wellspring of confusion that must be clarified by this Court. Congress changed the law with respect to the dischargeability of restitution orders in 1994 in response to the rendering of an opinion by this Court in *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990) rendered on May 19, 1990. The *Davenport* Debtors filed a Chapter 13 case since prior to their petition date in 1987, this Court had already considered the issue of whether restitution orders were dischargeable in Chapter 7 cases and determined that restitution is a non-dischargeable obligation based on 11 U.S.C. § 523(a)(7) which excludes from discharge any debt that is a government "fine, penalty or forfeiture . . . and is not compensation for actual pecuniary loss." *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986). The *Kelly* Court also held that

restitution is neither a debt nor "compensation for actual pecuniary loss," and that restitution orders are not dischargeable merely due to the fact that they are restitution orders. By contrast, in *Davenport* this Court held that while it was not specifically receding from *Kelly*, it was clear to the Court that it was the intention of Congress to provide for the discharge of restitution orders by providing extensively broad definitions of the words "debt" and "claim" and, finding that restitution orders fall within these definitions, found that they could be dischargeable.[5]

Further confusion stems from what Congress did to overrule portions of *Davenport* and why: In 1994 Congress amended the Bankruptcy Code in only two relevant ways: it changed Chapter 13 cases by adding to § 1328 that the court shall grant a discharge to any debtor for various debts *except* "for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime," 11 U.S.C. § 1328(a)(3), and by supposedly closing a loophole in Chapter 7 cases where restitution orders that provided payment directly to the "victims" and not to the government were considered by some courts to be dischargeable since they appeared to be more in the nature of civil debts as opposed to criminal restitution. 11 U.S.C. § 523(a)(13). This closure was

5. Accordingly, while the *Davenport* court claimed that it did not recede from the historical analysis and concern for issues of federalism found in *Kelly*, it nevertheless did precisely that, *Davenport* at 564, – in addition to overruling *Kelly* in that restitution orders are "debts" or "claims," and must be scrutinized to the full extent of the provisions of 11 U.S.C. § 523(a)(7). This is one of the central points of confusion created by these two opinions: *Davenport* claims not to overrule *Kelly* but nevertheless does so (hence our inclusion of Mr. Lincoln's anecdote). Furthermore, *Davenport* was partially overruled by Congress, but the extent to which Congress addressed either *Davenport* or *Kelly* remains unclear.

"supposed" due to the fact that 11 U.S.C. § 523(a)(13) specified that payment of an order of restitution was nondischargeable *if it was made pursuant to Title 18*, which is the federal criminal title, and does not include state court ordered restitution such as in this case.

Worse, the confusion created by *Kelly* and *Davenport* coupled with Congress' addressing the issue by amending Chapter 7 discharges only as they apply to federal restitution and prohibiting the discharge of restitution and criminal fines in Chapter 13 cases, creates an environment where the judiciary has begun to engage in unauthorized judicial legislation. Specifically, when faced with the legalistic "back and forth" presented by the current state of the law, two Circuit Courts opined that whether restitution is "civil" versus "criminal" is a test to use when analyzing the dischargeability of restitution orders – even though the concept of the nature of restitution does not exist in the statutes, and does not appear to have ever been contemplated by Congress.

The criminal justice systems of the states need a clear understanding of what is required in order for their interests in restitution orders to remain effective in light of the conflicting federal authority, and they should not be forced to rely on the whim of the judiciary in adding words to statutes that do not exist in order to accomplish that understanding. This Court is justified in clarifying the impact of federalism from the Bankruptcy Code as it applies to restitution orders, rectifying the tension created by this Court's opinions in *Kelly* and *Davenport*, and bringing resolution to a split in the Circuits that, if not resolved, promotes an atmosphere that permits the judiciary to change the plain meaning of the Acts of Congress.

II. Review Is Warranted To Resolve A Conflict Between The Eleventh, Third And Seventh Circuits Regarding The Dischargeability Of Restitution Orders.

The Eleventh Circuit's holding can be reconciled neither with the Seventh Circuit's holding in *In Re: Towers*, 162 F.3d 952 (7th Cir. 1998) nor the Third Circuit's holding in *In Re: Rashid*, 210 F.3d 201 (3d Cir. 2000), which both held that all four tiers of the test for dischargeability must be met in order for a restitution order to be determined nondischargeable.

11 U.S.C. § 523(a)(7) sets forth a simple, unambiguous test for determining whether or not a restitution order is dischargeable:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) or this title does not discharge an individual debtor from any debt –
>
> . . .
>
> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss. . . .

Broken down, the statute unambiguously provides that a debt is not discharged if the debtor is (1) an individual; (2) the debt is for a fine, penalty, or forfeiture; (3) the debt is payable to and for the benefit of a governmental unit; and (4) the debt is not compensation for actual pecuniary loss. There is no element of this or any other statute that provides

a basis for opining that an additional test regarding whether a restitution order is based on an underlying civil or criminal matter is a relevant inquiry. Nevertheless, of the four Circuit Court opinions dealing with this issue, two ignore the inquiry and two believe the civil or criminal aspect of a restitution order to be dispositive.

For example, in *In Re: Rashid*, 210 F.3d 201 (3d Cir. 2000), the Third Circuit Court of Appeals held that the language in § 523(a)(7), to the extent that discharge is excepted for restitution made payable "to and for the benefit of a governmental unit" is not met where the restitution is ultimately payable to a debtor's victims. That court held this to be true even if the payment is made to a governmental unit if the payments will ultimately be passed on to the victims.

The *Rashid* court based its opinion largely on that of *In Re: Towers*, 162 F.3d 952 (7th Cir. 1998). In that case an order of restitution was awarded to plaintiffs who had proceeded under the Illinois Consumer Fraud and Deceptive Business Practices Act. Even though the restitution order was awarded based in a civil and not a criminal statutory violation, the *Rashid* court looked at 523(a)(7) and determined that the debt was dischargeable since 523(a)(7) "offers weak support for exempting restitution orders from discharge . . . [since that section] does not mention restitution, and . . . operates only if the penalty is 'for the benefit of a governmental unit' — a condition not easy to satisfy when the governmental body is collecting for private creditors." *Towers* at 954.

In a later decision, the Third Circuit ruled that the civil nature of a restitution order was dispositive, stating that "[n]ot withstanding that in practical terms [the debtor's] restitution

payments are 'payable to' [a victim], *Kelly* dictates that we not interfere with [the state's] criminal restitution order." *In re: Thompson*, 418 F.3d 362, 368 (3d Cir. 2005). This opinion is in direct conflict the question of federalism addressed in *Davenport* and the Third Circuit's own opinion in *Rashid*, and it provided part of the basis for the Eleventh Circuit's holding in this case.

Both this case and *Thompson* made much of the "civil" versus "criminal" restitution issue which creates a further conflict with *Davenport*, *Towers* and *Rashid*, and does so even though § 523(a)(7) does not couch itself in terms of whether a fine, penalty or forfeiture is criminal in nature. This flies in the face of the plain meaning of the statute in two ways: first, the restitution order was specific in that the restitution was monetary and not based on any motive other than paying back the victims: "Total monetary restitution is to be paid through the Department of Corrections . . . forwarding said restitution to the victim(s), in the manner specified in the order of probation." This is clearly fails to satisfy both the "payable test" and the "pecuniary loss" test. Furthermore, to take the word "benefit" out of its unambiguous context and attach some intangible meaning to it serves only to vicarate the meaning of the sentence from which it is taken: The statute deals with the dischargeability of debts. 11 U.S.C. § 523(a). Debts are liabilities on a claim. 11 U.S.C. § 101(12). A claim is either a right to payment or a right to an equitable remedy for breach of performance. 11 U.S.C. § 101(5). When determining the meaning of "benefit," particularly where that word is unambiguous in its context, the maxim of *noscitur a sociis* applies.[6] *See Jarecki v. G.D. Searle & Co.*, 367 U.S.

6. This maxim provides that a word is known by the company it keeps. In otherwords, a word should be only applied within the obvious meaning intended based on the context in which it is found so as to avoid giving unintended breadth to the Acts of Congress.

303, 307, 81 S. Ct. 1579, 6 L. Ed. 2d 859 (1961). Also, the Third and Eleventh Circuits were not authorized to add their gloss to the plain meaning of the statute. *Grogan v. Garner*, 498 U.S. 279, 1115 S. Ct. 654, 112 L. Ed. 2d 755 (1991). Therefore, taking such extraordinary license with the plain meaning of the statute and its related parts highlights another example of the deep split that exists between the Circuit Courts that have reviewed this issue, and which must be addressed by this Court.

Accordingly, certiorari is warranted to resolve the conflict between this Court's decisions in *Kelly* and *Davenport* and the split between the Eleventh, Seventh and Third Circuit Courts of Appeal.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 20, 2006

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-16079

In Re: Victor VEROLA,

Debtor.

Bruce H. Colton, State Attorney,

Plaintiff-Appellee,

v.

Victor Verola,

Defendant-Appellant.

(April 20, 2006)

Before BIRCH and MARCUS, Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

Defendant-appellant, Victor Verola, appeals an order of the district court reversing the bankruptcy court's decision that the restitution obligation arising from his Florida conviction for fraudulent transactions was dischargeable

* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

under Chapter 7 of the Bankruptcy Code ("Code"). This appeal requires us to consider whether the Supreme Court's decision in *Kelly v. Robinson*[1] is still valid following both the Bankruptcy Reform Act of 1994 and the Supreme Court's decision in *Pennsylvania Department of Public Welfare v. Davenport*.[2] Because we find that it is and that the district court did not err in failing to follow the analysis employed by the Seventh and Third circuits in determining whether restitution is being paid "to and for the benefit of a government unit" for the purposes of 11 U.S.C. § 523(a)(7), we AFFIRM.

I. BACKGROUND

The facts underlying this appeal are not in dispute. In November 2001, the Nineteenth Judicial Circuit Court, Saint Lucie County, Florida, adjudged Verola guilty of fraudulent transactions made between 1994 and 1998, in violation of Fla. Stat. § 517.301(1)(a) (2001). R1-7, Exh. 3 at 1. He was sentenced to thirty-four months in prison. On 6 December 2001, he stipulated to and was ordered to pay $2,538,557.05 in restitution as a condition of ten years probation. *Id.*, Exh. 2 at 1. According to the restitution order, Verola was to pay the total amount of restitution "through the Department of Corrections, with an additional 4% fee for handling, processing, and forwarding said restitution to the victims(s)." *Id.*

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1. 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986)

2. 495 U.S. 552, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990)

Appendix A

Verola had previously filed for bankruptcy in March 2000 and, in October 2002, he sought a determination of the dischargeability of his restitution obligation under 11 U.S.C. § 523(a)(7). The bankruptcy court granted summary judgment in favor of Verola and found the restitution obligation dischargeable. The court explained that, because the restitution order made it clear that the money, although it was to be collected by the Department of Corrections, was then to be forwarded to the victims, the second requirement for excepting a debt from discharge—that the debt be "payable to and for the benefit of a governmental unit"—was left unsatisfied. *See* § 523(a)(7). The district court reversed and concluded that the Supreme Court's opinion in *Kelly* made clear that all state-imposed criminal restitution obligations meet the requirements prescribed by § 523(a)(7) and, thus, are not dischargeable.

On appeal, Verola argues that the district court erred in finding the restitution obligation nondischargeable. In so arguing, he asserts that (1) the Supreme Court's decision in *Davenport* "abrogated" its decision in *Kelly*; (2) the 1994 amendments to the Bankruptcy Code effectively preempted the Supreme Court's ruling in *Kelly*; and (3) the district court erred in failing to follow the test set out by the Seventh and Third Circuits for determining whether restitution is "payable to and for the benefit of a government unit" for the purposes of § 523(a)(7).

Appendix A

II. DISCUSSION

"We review legal conclusions by either the bankruptcy court or the district court *de novo*." *In re the New Power Co.*, 438 F.3d 1113, 1117 (11th Cir.2006). Title 11 U.S.C. § 523(a)(7) excepts from bankruptcy discharge a debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." In *Kelly*, the Supreme Court "h[e]ld that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence." *Kelly*, 479 U.S. at 50, 107 S.Ct. at 361. More specifically, the Court "conclude[d] that restitution orders imposed in [criminal] proceedings operate 'for the benefit of' the State. Similarly, they are not assessed 'for . . . compensation' of the victim." *Id.* at 53, 107 S.Ct. at 363 (omission in original). Thus, the Court found that restitution obligations imposed by states as part of criminal sentences were not dischargeable in a Chapter 7 proceeding.

Verola's restitution obligation is exactly that. Verola nevertheless argues that his restitution obligation should be discharged because (1) *Kelly* is no longer binding precedent and (2) his restitution obligation does not meet the second requirement that the restitution be payable "to and for the benefit of a government unit," even under *Kelly*.

A. *Kelly*

1. Effect of *Davenport*

Verola asserts that the Supreme Court's opinion in *Davenport* essentially abrogated its ruling in *Kelly*. In *Davenport*, the Court addressed an attempt by a Chapter 13

debtor to have a state-court-imposed criminal restitution order discharged. 495 U.S. at 556, 110 S.Ct. at 2129. The Court held that such "restitution orders [were] 'debts' as defined by § 101(11) [of the Bankruptcy Code]," making them subject to dischargeability analysis under § 523(a). *Id.* at 555, 110 S.Ct. at 2129 (alteration omitted). The Court concluded that, because the particular "exception to discharge relied on in *Kelly* [(§ 523(a)(7)) did] not extend to Chapter 13," restitution obligations were dischargeable thereunder. *Id.* Although the Court in *Davenport* arguably reversed dicta in *Kelly* expressing doubt over whether Congress intended to include restitution orders in the category of "debts" for purposes of the Code, it did not question the general holding that state-court-imposed restitution obligations are not dischargeable under § 523(a)(7).[3] Nor did it shake the underlying motivating principle that "federal bankruptcy courts should not invalidate the results of state criminal proceedings [because t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." *Kelly*, 479 U.S. at 47, 107 S.Ct. at 360.

Accordingly, we find that the opinion in *Davenport*, particularly in light of the fact that Congress soon thereafter amended the Bankruptcy Code to overrule the decision by specifically making criminal restitution obligations non-

3. The Court in *Kelly* admitted "hav[ing] serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)" of the Bankruptcy Code, but concluded that it "need not address that question" because its holding was based upon § 523(a)(7). *Kelly*, 479 U.S. at 50, 107 S.Ct. at 361.

dischargeable under Chapter 13 as well,[4] had no effect relevant to this case on the Court's holding in *Kelly*.

2. Effect of 1994 Amendments

Verola also asserts that Congress's 1994 addition to the Code of 11 U.S.C. § 523(a)(13), which exempts from discharge restitution obligations imposed under title 18 of the United States Code, effectively changed the meaning of § 523(a)(7) because Congress did not take the opportunity explicitly to add an exemption for state-imposed restitution obligations under Chapter 7. He makes a similar argument with respect to Congress's earlier addition of 11 U.S.C. § 1328(a)(3).[5] As has been observed by the Seventh Circuit, "[i]f Congress wants to supercede the Supreme Court's decisions, it must amend the statute the Court has construed; continuity of text equals continuity of meaning." *In re Towers*,

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4. Title 11 U.S.C. § 1328(a)(3), which made state-court-imposed criminal restitution orders dischargeable under Chapter 13, was added to the Code in reaction to the *Davenport* decision by way of the Criminal Victims Protection Act of 1990. *See In re Clark*, 222 B.R. 114, 119 (Bankr.N.D.Ohio 1997) (citing S.Rep. No. 101-434, *reprinted in* 1990 U.S.C.C.A.N. 405, 4071; H.R.Rep. No. 101-681(I), *reprinted in* 1990 U.S.C.C.A.N. 472, 6571).

5. We note Verola's argument in apparent reliance upon the doctrine of *expressio unius est exclusio alterius* might have had more force had all three provisions been drafted at once, as opposed to the provisions specifically protecting federal restitution orders and criminal restitution orders under Chapter 13 having been drafted after the Court's ruling in *Kelly* had already explicitly extended the protection of § 523(a)(7) to state criminal restitution obligations under Chapter 7.

162 F.3d 952, 954 (7th Cir.1998). To the contrary of Verola's argument, we find that the 1994 amendments to the Code reflect, if anything, Congressional approval of the result reached by the Court in *Kelly*.

B. *"Payable" Test*

Finally, Verola challenges the district court's refusal to follow the analysis employed by the Seventh and Third Circuits regarding the second prong of § 523(a)(7). The courts in both cases pointed out that *Kelly* involved a restitution order under which a "governmental unit kept the restitution," because "the state was itself the victim." *Towers*, 162 F.3d at 955; *see In re Rashid*, 210 F.3d 201, 207 (3d Cir.2000) (per curiam). Both courts rejected the argument that restitution paid to a private victim is still paid for the benefit of the government by way of its deterrent effect and concluded that the restitution orders in their cases were not excepted from discharge under § 523(a)(7) because the "the context in which the word ' "benefit" appears—"payable to and for the benefit of a governmental unit"—implies that the "benefit" in question is the benefit of the money that is "payable to" the governmental unit.' " *Rashid*, 210 F.3d at 208 (quoting *Towers*, 162 F.3d at 956).

We do not find this approach to be applicable to Verola's restitution order. First, both circuit cases may be easily distinguished from this case. *Towers* concerns the dischargeability of a state civil restitution order. *Towers*, 162 F.3d at 953. *Rashid* addresses the dischargeability of a federal criminal restitution order. *Rashid*, 210 F.3d at 203. As noted by the court in *Rashid*, "Federal criminal restitution orders

and civil restitution orders share one important distinction from *Kelly*—neither implicates the federal court's longstanding 'reluctan[ce] to interpret federal bankruptcy statutes to remit state criminal judgements.' " *Id.* at 208 n. 3 (quoting *Kelly*, 479 U.S. at 44, 107 S.Ct. at 353) (alteration in original). Second, despite the fact that *Kelly* involved a restitution order in which the victim was a government entity, the Court generally held that " § 523(a)(7) preserves from discharge *any* condition a state criminal court imposes as part of a criminal sentence." *Kelly*, 479 U.S. at 50, 107 S.Ct. at 361 (emphasis added). To the extent the distinction between restitution orders does not, in each case, explain the different approach taken, the analysis employed in *Towers* and *Rashid* directly conflicts with *Kelly*.[6] Because *Kelly* remains binding Supreme Court precedent, the district court did not err in failing to employ the analysis suggested by *Towers* and *Rashid*.

III. CONCLUSION

Verola appeals the district court's reversal of the bankruptcy court's decision that his state-court-imposed criminal restitution obligation was dischargeable in his Chapter 7 bankruptcy proceedings. Because the Supreme Court's holding in *Kelly*, that § 523(a)(7) makes all state-imposed criminal restitution obligations non-dischargeable, is still the law of the land, we **AFFIRM**.

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6. The Third Circuit itself recognized this tension. *See In re Thompson*, 418 F.3d 362, 368 (3d Cir.2005) (distinguishing *Towers* and *Rashid* and stating that "[n]otwithstanding that in practical terms [the debtor's] restitution payments are 'payable to' [an individual], *Kelly* dictates that we not interfere with [the state's] criminal restitution order.").

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, WEST PALM BEACH DIVISION REVERSING ORDER OF BANKRUPTCY COURT DATED AND FILED AUGUST 16, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 03-14217-CIV-MIDDLEBROOKS

IN RE:

VICTOR VEROLA,

Debtor.

VICTOR VITO VEROLA,

Plaintiff, Appellee,

vs.

BRUCE H. COLTON, in his capacity as State Attorney for the Nineteenth Judicial Circuit of Florida,

Defendant/Appellant.

ORDER REVERSING ORDER OF BANKRUPTCY COURT

THIS CAUSE comes before the Court upon an appeal by Bruce H. Colton in his capacity as State Attorney for the Nineteenth Judicial Circuit of Florida of the Bankruptcy Court's Order Granting Plaintiff's Motion for Summary

Appendix B

Judgment and Denying Defendant's Motion for Summary Judgment entered on July 9, 2003. On July 17, 2003, appellant filed a timely notice of appeal. The appellant filed his initial brief on October 1, 2003. Upon Court Order, Appellant re-filed a version of his initial brief on December 1, 2003. The Amicus Curiae Brief of Martin and Britta Krag in Support of the Position of Appellant, Bruce H. Colton was filed October 8, 2003. The Court has reviewed the submissions of the parties and amicus curiae, the record on appeal, and is otherwise fully advised in the premises.

Introduction

The issue under examination in this bankruptcy appeal is whether restitution orders entered by state criminal courts may be discharged in Chapter 7 bankruptcy proceedings or whether they are exempt from discharge under 11 U.S.C. § 523(a)(7).

Standard of Review

This Court has jurisdiction over appeals of Bankruptcy Court decisions pursuant to 28 U.S.C. § 1589(a). "District courts function as an appellate court in reviewing Bankruptcy Courts' decisions." *In re Martinez*, 271 B.R. 696, 698 (S.D.Fla.2001). In fulfilling this appellate capacity, the district court's review is constrained by certain well-defined parameters, *viz.*, "[t]he factual findings of the bankruptcy court cannot be set aside unless they are clearly erroneous," although conclusions of law made by the Bankruptcy Court are subject to plenary, or *de novo*, review. *In re Calvert*, 907 F.2d 1069, 1071 (11th Cir.1990). "*De Novo* review requires

the Court to make a judgment 'independent of the bankruptcy court's, without deference to that court's analysis and conclusions.' " *Colwell v. Royal Int'l Trading Corp.*, 226 B.R. 714, 717 (S.D.Fla.1998) (quoting *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1210 (7th Cir.1984)). Where an issue raises a mixed question of fact and law, the Court similarly reviews the Bankruptcy Court's determination de novo. *See id.* n. 2; *In re Marks*, 131 B.R. 220, 222 (S.D.Fla.1991) *aff'd*, 976 F.2d 743 (11th Cir.1992). In this case, the facts are undisputed. The issues presented in this appeal concern the proper application of legal principles to those facts. Accordingly, the proper standard of review is de novo.

Background

The facts germane to this appeal, taken from the uncontroverted submissions of the parties, are as follows. Between November 15, 1994 and January 23, 1998, the Debtor committed the crime of Fraudulent Transactions when he obtained over $50,000 from 81 investors by making an untrue statement of material fact or omitting to state a material fact in connection with rendering investment advice or conducting the offer, sale, or purchase of an investment or security. On March 23, 2001, Verola was charged, by state court information, with Fraudulent Transactions. Verola pled nolo contendere to the charge. On November 21, 2001, the Nineteenth Judicial Circuit Court in and for Saint Lucie County, Florida adjudicated Verola guilty of Fraudulent Transactions pursuant to Fla. Sat. § 517.301(1)(a). He was sentenced to thirty-four months in prison. On December 6, 2001, Debtor stipulated to and was ordered to pay $2,538,557.05 in restitution as a condition of ten years

probation. See Judgment and Restitution Order in State of Florida vs. Victor Vito Verola, case no. 01-771CFA, 19th Judicial Circuit, State of Florida. Restitution was ordered for each victim in the amount that said victim was defrauded. The restitution order required Verola to fulfill his obligations in the following manner: "Total monetary restitution is to be paid through the Department of Corrections, with an additional 4% fee for handling, processing, and forwarding said restitution to the victim(s), in the manner specified in the order of probation." See Restitution Order.

On October 17, 2002, an adversary proceeding was commenced with the filing of the Debtor's Complaint to Determine Dischargeability of Debt pursuant to 11 U.S.C. § 523(a)(7). The Complaint was filed against Bruce Colton, as State Attorney for the 19th Judicial Circuit of Florida. On January 15, 2003, the Debtor filed his Motion for Summary Judgment. Creditor filed a Motion for Summary Judgment on April 3, 2003. Both the Debtor and Creditor agreed that there were no genuine issues of material fact. On July 9, 2003, the Bankruptcy Court granted the Debtor's Motion for Summary Judgment and Denied Creditor's.

In the Bankruptcy Court's Order, United States Bankruptcy Judge Steven H. Friedman found Debtor's restitution obligation dischargeable. Judge Friedman found that because the language in the restitution order made it clear that the money was to be forwarded to the victims, the second requirement to establish that a debt is discharged under 11 U.S.C. § 523(a)(7) that the debt be "payable to and for the benefit of a governmental unit," was not met. This appeal timely followed.

Appendix B

Discussion

Section 523(a)(7) excepts from discharge a debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7). In order to except a debt from discharge under Section 523(a)(7), the creditor must show that the debt is created by a "(1) fine, penalty, or forfeiture (2) payable to and for the benefit of a governmental unit [that] (3)[is] not compensation for actual pecuniary loss, other than a tax penalty." *In re Rashid*, 210 F.3d 201, 206 (3rd Cir.2000); *In re Towers*, 162 F.3d 952, 954-955 (7th Cir.1998).

In *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), the Supreme Court examined whether a restitution order constitutes a fine, penalty, or forfeiture within the meaning of § 523(a)(7). In *Kelly*, the debtor pled guilty in Connecticut state court to a larceny charge based on her wrongful receipt of welfare benefits from the Connecticut Department of Income Maintenance. *Id.* at 38, 107 S.Ct. 353. As a condition of her probation sentence, the state court ordered the debtor to make restitution to the State of Connecticut Office of Adult Probation. *Id.* at 39, 107 S.Ct. 353. The debtor subsequently filed a Chapter 7 petition and sought to discharge the restitution obligation. The Court found that although "[u]nlike traditional fines, restitution is forwarded to the victim, and may be calculated by reference to the amount of harm the offender has caused . . . neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution." *Kelly*, 479 U.S. at 51-52, 107 S.Ct. 353. The Supreme Court

explained that because "criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude the restitution orders imposed in such proceedings operate 'for the benefit of the State' " and not for the compensation of the victim. *Id.* at 53, 107 S.Ct. 353. It held that the penal and rehabilitative interests of the state were sufficient to "place restitution orders within the meaning of § 523(a)(7)." *Id.*

In *Kelly*, the Supreme Court clearly held that "§ 523(a)(7) preserves from discharge any condition a state criminal court imposes as a part of a criminal sentence." *Id.* at 50, 107 S.Ct. 353. It pointed out that it has repeatedly emphasized its policy against federal interference with state criminal prosecution and accordingly that federal bankruptcy courts should not interfere with the States' rights to formulate and enforce penal sanctions. *Id.* at 47, 107 S.Ct. 353.

In the Bankruptcy Court's Order of July 9, 2003, the Bankruptcy Court stated that in the instant case, "Debtor's restitution order was a fine and was not for the compensation of his victims' actual pecuniary loss, thereby satisfying the first and third requirements under § 523(a)(7)." (Bankruptcy Court's Order at 6-7). The Bankruptcy Court, however, found that because unlike in *Kelly*, the restitution would not be kept by a governmental unit, the restitution in this case is not "payable to and for the benefit of a governmental unit." In support of its decision to distinguish *Kelly*, the Bankruptcy Court relied on *In re Rashid*, 210 F.3d 201 (3rd Cir.2000) and *In re Towers*, 162 F.3d 952 (7th Cir.1998). Both cases were decided after *Kelly*. The Courts in both cases distinguished their cases from Kelly by way of the fact that

unlike in Kelly, in their cases, the governmental unit did not actually keep the restitution at issue. *Rashid* concerned a federal criminal restitution order and *Towers* concerned a civil restitution obligation.

The Court disagrees with the Bankruptcy Court's interpretation of the law surrounding the dischargeability of state criminal restitution orders. Although in *Kelly*, the governmental unit kept the restitution, this was not the basis of the Supreme Court's decision. The Supreme Court argued that the restitution was "payable to and for the benefit of a governmental unit," because restitution orders, although "forwarded to the victim," operate for the benefit of the State. *Kelly*, 479 U.S. at 52-53, 107 S.Ct. 353.

Additionally, the opinions of the Third Circuit and Seventh Circuit are distinguishable from both *Kelly* and the instant case. This case, like *Kelly* involves state criminal restitution. As stated by the Third Circuit, "*Towers* concerns a civil rather than criminal order of restitution. Federal criminal restitution orders and civil restitution orders share one important distinction from *Kelly*—neither implicates the federal court's longstanding 'reluctance to interpret federal bankruptcy statutes to remit state criminal judgments.' " *Rashid*, 210 F.3d at 208 fn. 3 (citing *Kelly*, 479 U.S. at 44, 107 S.Ct. 353). The United States Bankruptcy Appellate Panel of the Ninth Circuit has held that *Rashid* is not controlling when a case concerns a restitution order in a state criminal judgment. *In re Warfel*, 268 B.R. 205, 212 (9th Cir. BAP 2001)(holding restitution imposed as a condition of probation nondischargeable under § 523(a)(7) whether or not criminal proceedings had terminated and the order became a

civil judgment). The *Rashid* and *Towers* cases, unlike this case, did not invoke the same issues of federalism precluding discharge found in *Kelly*. The Court therefore finds *Kelly*, not *Rashid* or *Towers*, controlling.

Verola makes an additional argument in favor of his position. Although this argument was not utilized by the Bankruptcy Court in its reasoning, the Court will address it briefly. Verola argues that after the *Kelly* decision, Congress revisited the issue of dischargeability and in choosing not to amend § 523(a)(7) to include the word restitution, indicated its legislative intent to make restitution dischargeable. In response to *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990), which held restitution orders dischargeable in Chapter 13 cases, in 1994 the Bankruptcy Code was amended. Section 523(a)(13) now provides that "any payment of an order of restitution under Title 18, United States Code" is nondischargeable. Verola argues that because Congress specifically visited the issue of criminal restitution and did not amend § 523(a)(7), it shows legislative intent to make restitution orders dischargeable. The Court disagrees. Congress' failure to amend § 523(a)(7) after the *Kelly* decision can also be read as an indication that it did not find that the Supreme Court's holding in Kelly violated legislative intent. "The action taken by Congress emphasized the continuing vitality of the fundamental policy expressed in *Kelly v. Robinson* against federal interference with state criminal prosecutors." *In re Perrin*, 233 B.R. 71, 76 (Bkrtcy.D.N.J.1999). *See also In re Hardenberg*, 42 F.3d 986, 992 (6th Cir.1994).

Appendix B

Conclusion

Consistent with the above discussion, it is hereby

ORDERED AND ADJUDGED that the Bankruptcy Court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment, filed July 9, 2003 is Reversed and Remanded for entry of a Judgment not inconsistent with this Order.

It is FURTHER ORDERED AND ADJUDGED that Case No. 03-14217-CIV-MIDDLEBROOKS shall be CLOSED.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 16 day of August, 2004.

s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED JULY 8, 2003 WITH RESTITUTION ORDER

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 00-31318-BKC-SHF
Chapter 7 Proceeding

Adv. No.: 02-3304-BKC-SHF-A

IN RE:

VICTOR VEROLA,

Debtor.

VICTOR VEROLA,

Plaintiff,

v.

BRUCE H. COLTON, in his capacity as State Attorney for the Nineteenth Judicial Circuit of Florida,

Defendant.

Appendix C

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came on to be heard on July 1, 2003 upon both the Plaintiff's Motion for Summary Judgment, filed by Victor Verola (the "Debtor"), and the Defendant's Motion for Summary Judgment, filed by Bruce Colton ("Colton"). On January 15, 2003, the Debtor filed his Motion for Summary Judgment. Thereafter, on February 18, 2003, Colton filed Defendant's Response to Plaintiff's Motion for Summary Judgment (the "Defendant's Response"). On March 4, 2003, the Debtor filed Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment in Support of Granting its Motion for Summary Judgment (the "Plaintiff's Reply"). Subsequently, on April 2, 2003, Colton filed Defendant's Motion for Summary Judgment. Having carefully reviewed both motions for summary judgment, the Defendant's Response, and the Plaintiff's Reply, and for the reasons discussed below, the Plaintiff's Motion for Summary Judgment is **granted** and the Defendant's Motion for Summary Judgment is **denied**.

On March 28, 2000, the Debtor filed a voluntary Chapter 7 petition. Subsequently, on December 6, 2000, the Debtor received his discharge. Thereafter, on October 17, 2002, the above captioned adversary proceeding was commenced with the Debtor's filing of the Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(7). On January 15, 2003, the Debtor filed his Motion for Summary Judgment stating that there is no genuine issue of

any material fact and claiming that the Debtor is entitled to summary judgment as a matter of law because the debt in the restitution order does not constitute a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit and is compensation for actual pecuniary loss. Accordingly, the Debtor asserts that the debt arising under the restitution order is dischargeable. On the other hand, on April 3, 2003, Colton filed his Motion for Summary Judgment also stating that there is no genuine issue of any material fact but claiming that Colton is entitled to summary judgment as a matter of law because the debt delineated in the restitution order is a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit and does not constitute compensation for actual pecuniary loss. Thus, Colton contends that the debt is non-dischargeable pursuant to 11 U.S.C. § 523(a)(7).

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(b)(1) and 157(b)(2)(I). This is a core matter in accordance with 28 U.S.C. § 157(b)(2)(I).

Federal Rule of Civil Procedure 56(c), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056, provides that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 247-8, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), *Rice v. Branigar Org., Inc.*, 922 F.2d 788 (11th Cir.1991); *In re Pierre*, 198 B.R. 389 (Bankr.S.D.Fla.1996). Rule 56 is based upon the principle that if the court is made aware of the absence of genuine issues of material fact, the court should, upon motion, promptly adjudicate the legal questions which remain and terminate the case, thus avoiding delay and expense associated with trial. *See United States v. Feinstein*, 717 F.Supp. 1552 (S.D.Fla.1989). "Summary judgment is appropriate when, after drawing all reasonable inference in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party." *Murray v. National Broad. Co.*, 844 F.2d 988, 992 (2d Cir.1988).

The legal standard governing the entry of summary judgment has been articulated by the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In *Anderson*, the Supreme Court stated that the standard for summary judgment mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50(a), which provides that the trial judge must direct a verdict if there can be but one reasonable conclusion as to the verdict. *Id.* at 250, 106 S.Ct. 2505. The Court explained that the inquiry under summary judgment and directed verdict are the same: "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S.Ct. 2505.

In order to defeat a motion for summary judgment under this standard, the non-moving party must do more than simply

show that there is some doubt as to the facts of the case. *Id.* at 252, 106 S.Ct. 2505. Rule 56 must be construed not only with regard to the party moving for summary judgment but also with regard to the non-moving party and that party's duty to demonstrate that the movant's claims have no factual basis. *Id.* "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could find for the [non-moving party]." *Id.* Thus, the non-moving party must establish the existence of a genuine issue of material fact and may not rest upon its pleadings or mere assertions of disputed fact to prevent a court's entry of summary judgment. *See First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *In re Pierre*, 198 B.R. 389 (Bankr.S.D.Fla.1996).

Sub judice, the facts are undisputed. Between November 15, 1994 and January 23, 1998, the Debtor committed the crime of Fraudulent Transactions when he obtained over $50,000 from 81 investors by making an untrue statement of material fact or omitting to state a material fact in connection with rendering investment advice or conducting the offer, sale, or purchase of an investment or security. On November 21, 2001, the Nineteenth Judicial Circuit Court in and for Saint Lucie County, Florida adjudicated the Debtor guilty of Fraudulent Transactions pursuant to Fla. Stat. § 517.301(1)(a). Subsequently, on December 6, 2001, the Debtor stipulated to the entry of a restitution order, which required the Debtor to pay $2,538,557.05 for the benefit of the 81 investors. The restitution order required the Debtor to "fulfill the obligations" in the following manner:

Appendix C

> Total monetary restitution is to be paid through the Department of Corrections, with an additional 4% fee for handling, processing, and forwarding said restitution to the victim(s), in the manner specified in the order of probation.[1]

In the instant complaint, the Debtor asserts that because the restitution order operates to collect money from the Debtor for the benefit of various individuals, who are private citizens and thus who cannot qualify as a governmental unit, and because the restitution order operates to pay various alleged victims for losses they suffered prior to the petition date, the debt arising under the restitution order is dischargeable. Colton admits that the restitution order requires the Debtor to repay his victims in accordance with Florida law and admits that the victims do not constitute a "governmental unit." However, Colton asserts that the debt arising under the restitution order is non-dischargeable pursuant to 11 U.S.C. § 523(a)(7). Therefore, the determinative issue is whether the Debtor may discharge the debt arising from the restitution order.

Section 523(a)(7) of the Bankruptcy Code excepts from discharge a debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7). In order to except a debt from discharge under Section 523(a)(7), the creditor must meet

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1. See attached restitution order. The restitution order, which was attached to both the Debtor's Complaint and Colton's Motion for Summary Judgment, was the only evidence illustrating the nature of the obligation at issue.

three *270 requirements. *See In re Rashid*, 210 F.3d 201, 206 (3rd Cir.2000); *see also In re Towers*, 162 F.3d 952, 954-955 (7th Cir.1998). The creditor must show that the debt is created by a "(1) fine, penalty, or forfeiture (2) payable to and for the benefit of a governmental unit [that] (3)[is] not compensation for actual pecuniary loss, other than a tax penalty." *Id.*

The Supreme Court dealt with the issue of whether a restitution order constitutes a fine, penalty, or forfeiture within the meaning of § 523(a)(7) in *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). In *Kelly*, the debtor pleaded guilty in a Connecticut state court to a larceny charge based on her wrongful receipt of $9,932.95 in welfare benefits from the Connecticut Department of Income Maintenance. *Id.* at 38, 107 S.Ct. 353. As a condition of the debtor's probation sentence, the state court judge ordered the debtor to make restitution to the State of Connecticut Office of Adult Probation. *Id.* at 39, 107 S.Ct. 353. Thereafter, the debtor filed a Chapter 7 petition and sought to discharge the restitution obligation. *Id.* The Court assumed that the restitution was a fine and thus satisfied the first requirement under Section 523(a)(7), that the debt constitute a "fine, penalty, or forfeiture." *Id.* at 52, 107 S.Ct. 353. Similarly, the Court found the second requirement under § 523(a)(7), that the debt be "payable to and for the benefit of a governmental unit," to be satisfied because the restitution was payable to and for the benefit of the State of Connecticut Office of Adult Probation. *Id.*

Regarding the third element, that the debt is "not compensation for actual pecuniary loss," the Court in

Kelly explained that although restitution appears to be "compensation for actual pecuniary loss" from the perspective of the victim, restitution is actually something more. *Id.* "Governments seek restitution to promote law enforcement by deterrence as well as compensation." *Id.*; *see also In re Towers*, 162 F.3d at 955. Requiring that the defendant compensate the victims for their loss

> forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.

Kelly, 479 U.S. at 49 n. 10, 107 S.Ct. 353; *see also In re Rashid*, 210 F.3d at 206; In re Towers, 162 F.3d at 955. Thus, due to the law enforcement benefit of restitution, the Court found that the restitution order was not compensation for actual pecuniary loss, thereby satisfying the third requirement under § 523(a)(7). The Court ultimately held that "§ 523(a)(7) preserves from discharge any condition a state court imposes as part of a criminal sentence," including restitution. *Kelly*, 479 U.S. at 50, 107 S.Ct. 353. Similarly, in the instant case, the Court finds that the Debtor's restitution order was a fine and was not for the compensation of his victims' actual pecuniary loss, thereby satisfying the first and third requirements under § 523(a)(7).

However, the second requirement, that the amount be "payable to and for the benefit of a governmental unit," is not satisfied in this case. In *Kelly*, the debtor was required to pay restitution to the State of Connecticut Office of Adult Probation, from which she fraudulently received payments. *Id.* at 38-39, 107 S.Ct. 353. A governmental unit kept the restitution, and thus, there was "no doubt that the restitution was 'payable to and for the benefit of a governmental unit.' "*In re Rashid*, 210 F.3d at 207. To the contrary, in the instant situation, the restitution order specifies that the restitution is to be paid to the Department of Corrections, which will then forward the restitution to the victims.[2] In *Towers*, the Seventh Circuit observed that § 523(a)(7) "offers weak support for exempting restitution orders from discharge, for it does not mention restitution, and it operates only if the penalty is 'for the benefit of a governmental unit'-a condition not easy to satisfy when the governmental body is collecting for private creditors." *In re Towers*, 162 F.3d at 954. The court in *Towers* held that "the context in which 'benefit' appears-'payable to and for the benefit of a governmental unit'- implies that the benefit in question is the benefit of the money that is 'payable to' the governmental unit." *Id.* at 956. Similarly, the Third Circuit found that "the word 'payable' clearly casts an economic light over the phrase that suggests that the benefit must be conferred from the monetary value of the debt to be paid by the defendant and not the more abstract benefit of criminal deterrence." *In re Rashid*, 210 F.3d at 208.

In the instant case, it is clear from the specific language in the restitution order that the benefit, the money, is to be

2. See attached restitution order.

forwarded to the victims. Thus, the second requirement to establish that a debt is excepted from discharge under § 523(a)(7), that the debt be "payable to and for the benefit of a governmental unit," is not met. Therefore, the Court finds that the Debtor's restitution obligation is dischargeable. Accordingly, it is

ORDERED THAT:

(1) The Plaintiff's Motion for Summary Judgment is **granted**.

(2) The Defendant's Motion for Summary Judgment is **denied**.

ORDERED in the Southern District of Florida this 8th day of July, 2003.

s/ Steven H. Friedman
STEVEN H. FRIEDMAN
U.S. BANKRUPTCY JUDGE

Appendix C

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA

Case No. 01-771-CF

STATE OF FLORIDA

-VS-

A. Victor Vito Verola,

Defendant.

RESTITUTION ORDER

* * *

_XX_ Restitution is ordered for the following persons:

* * *

____ The total amount of restitution is $2,538,557.05.

It is further ordered that the defendant fulfill restitution obligations in the following manner (check one, if applicable):

_XX_ Total monetary restitution is to be paid through the Department of Corrections, with an additional 4% fee for handling, processing, and forwarding said restitution to the victim(s), in the manner specified in the order of probation.

Appendix C

____ Total monetary restitution is to be paid through the Clerk of Court, pursuant to Section 775.089(11)(a), in the manner specified in the judgement and sentence.

For which let execution issue.

ORDERED AND ADJUDGED that the State's Motion is hereby Granted.

DONE AND ORDERED in Ft. Pierce, St. Lucie County, Florida on this 6 day of Dec. 2001.

s/ Robert M. Makemson
Robert M. Makemson, Circuit Judge